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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 335

MERRILL L. NORTON, *Petitioner*,

v.

JACK CAMPBELL, Governor of the State of New Mexico; BRUCE KING, Speaker of the House of Representatives of the State of New Mexico; W. C. WHEATLEY, President or presiding officer *pro tempore* of the Senate of the State of New Mexico; *et als.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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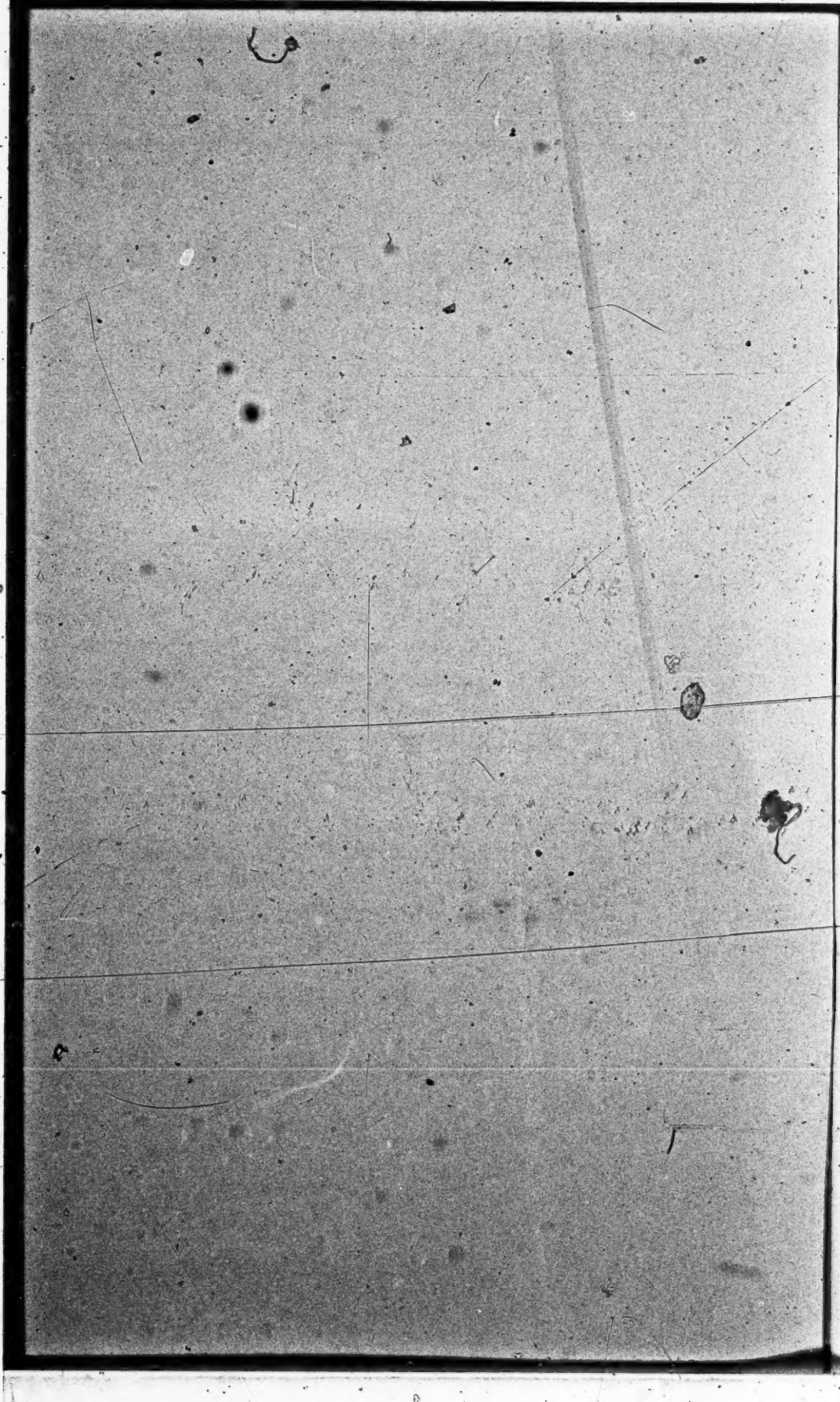

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MERRILL L. NORTON, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on May 6, 1966.

OPINIONS BELOW

The opinion of the district court (R. 14-16) is not reported. The opinion of the court below (Appendix A, *infra*, pp. A1-A7) is reported at 359 F. 2d 608.

JURISDICTION

The judgment of the court below (Appendix B, *infra*, pp. A7-A8) was entered on May 6, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Article I, Section 2, of the Constitution of the United States permits a State to elect its Representatives in Congress on a virtually permanent at large basis, by failing to divide the State into congressional districts for nearly 25 years after becoming entitled to more than one Representative.

2. Whether, where a State entitled to more than one Representative in Congress has for nearly 25 years failed to divide the State into congressional districts, so that every Representative elected in 12 successive Congressional elections has come from one section of the State, a United States Court is required, in view of Article I, Section 2 of the Constitution of the United States, to grant relief looking to the effectuation of such a division.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and the Federal and State statutes involved are set forth in Appendix C, *infra*, pp. A8-A11.

STATEMENT

Although the State of New Mexico has been entitled to two Representatives in Congress since 1941 (Pl. Ex. 2, R. 32-33, 85), it has never been divided into Congressional districts (R. 26, 36, 38), no bill to that end introduced in

the State legislature since 1941 has ever passed (R. 34, 36, 38; Pl. Ex. 4, R. 34-35, 86; Pl. Ex. 5, R. 87-88), and from the election of 1942 down to the present time, through 12 successive Congressional elections, both New Mexico Congressmen have been elected at large (R. 26, 36, 39).

During that period, eight individuals have represented New Mexico in the House of Representatives, each of whom has come from the northern half of the State, as follows:

Congressman	City	County	When Elected
Clinton M. Anderson	Albuquerque	Bernalillo	1942, 1944
Antonio M. Fernandez	Santa Fe	Santa Fe	1942 through 1956, inclusive
Georgia L. Lusk	Santa Fe	Santa Fe	1946
John E. Miles	Santa Fe	Santa Fe	1948
John J. Dempsey	Santa Fe	Santa Fe	1950 through 1956, inclusive
Joseph M. Montoya	Santa Fe	Santa Fe	1957 through 1962, inclusive[1]
Thomas G. Morris	Tucumcari	Quay	1958 through 1964, inclusive
E. S. Johnny Walker	Santa Fe	Santa Fe	1964[2]

Although no New Mexico statute specifically requires election of Representatives at large, it has been the unvarying practice to do so since the first election at which the State became entitled to more than one (R. 26, 36, 39). In 1957 an absentee voting law prescribing the form of the "Official Absent Voter's Ballot" set forth the following entry (§ 3-14-20, N.M. Stat. 1953, Ann., added by Laws 1957, ch. 217, § 10; *infra*, pp. A10-A11):

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[1] Elected at special election, April 9, 1957, vice Antonio M. Fernandez, deceased, at which time his residence was at Pena Blanca in Sandoval County (R. 34, 86), which is adjacent to Santa Fe County, his present residence.

[2] Pl. Ex. 3, R. 33-34, R. 85-86; *New Mexico Blue Book, 1965-1966*, p. 42; *Congressional Directory*, 89th Cong., 2d sess., pp. 101-102.

"REPRESENTATIVES AT LARGE IN CONGRESS

"Write in the names of your choice for
"representatives at large

"Vote for two

_____
_____
_____
_____."

In 1959, the Legislature provided that the two Congressmen at large should be voted for by position places, as follows (§ 3-10-19.1, N.M. Stat. 1953, Ann., added by Laws 1959, ch. 71, § 1; *infra*, p. A10):

> **"3-10-19.1. Representatives in Congress—Nomination and election.**—In any primary, general or special election for United States representative, there shall be designated by the officer issuing the election proclamation as many places, consecutively numbered, as there are United States representatives to be elected and only one [1] United States representative shall be elected for each place designated. Each candidate upon filing his petition, or any convention called for nominating candidates, shall designate the position number for which he is a candidate and he shall be so designated on the ballot."

The foregoing provision is implemented in the prescribed form of tally book for election officials (§ 3-3-20, N.M. Stat. 1953, Ann., as amended through 1963; *infra*, pp. A9-A10) as follows:

"FOR REPRESENTATIVE IN CONGRESS

"Position 1 —— received (words and figures) —— votes
—— received (words and figures) —— votes
—— received (words and figures) —— votes

"Position 2 —— received (words and figures) —— votes
—— received (words and figures) —— votes
—— received (words and figures) —— votes"

The present action was brought by a resident and registered voter of Lovington, Lea County, in the southeast-

ern portion of the State, against the appropriate State officials, to obtain legislation, or in the alternative in the event of the Legislature's failure to act, seeking a decree, "dividing the State of New Mexico into two Congressional Districts, equal in population but giving heed to geographic considerations and the homogeneity of economic interests within said geographical divisions" (R. 3-4).

The gravamen of the action was set forth as follows in the complaint:

"That the purpose of Congressional districting was to establish electoral bodies of citizens having mutual and common interest geographically, economically, socially and politically; that such districting has been done by virtually all of the other States of the Union and that the time has now arisen when the plaintiff and the entire electorate of the State of New Mexico should enjoy their right to Congressional districting whereby there will be one Representative answerable to each district and its citizens and by means of which specific responsibility cannot be ignored * * *" (¶3, R. 4-5).

That since Representatives in other States are answerable to an average of 411,547 constituents while each New Mexico Representative at large is answerable to all 951,023, the total population of the State, "the electorate, citizens and residents of the State of New Mexico are thus deprived of their rights and privileges to be properly represented in the United States Congress by elected Representatives answerable to a specific Congressional District" (¶ 5, R. 5).

That the scheme of permanent representation at large conflicts with the doctrine of *Wesberry* v. *Sanders*, 376 U.S. 1, "in that it deprives the voters of certain localities with insufficient population of any representation whatsoever and thus discriminates in favor of large metropolitan centers and the inhabitants thereof" (¶7, R. 7).

Following the introduction of bills to district the State, and the consequent contention of the respondents that the case had therefore become moot (Ans., ¶2; R. 10), petitioner moved for a voluntary dismissal of the complaint without prejudice (R. 12-13). Thereafter, when the Attorney General insisted that the matter be determined on the merits pursuant to instructions from "the leadership * * * in both houses of the Legislature" (R. 80), petitioner was permitted to withdraw that motion and proceed (R. 29). Subsequently one of the districting bills passed one house of the Legislature, but was killed on reconsideration the following day.[3]

The proof showed that there were substantial economic and social differences between the northern and the southern portions of the State (R. 45-47, 52-53), and the plaintiff testified that he not only was required to share his vote with another district (R. 49), but also that, as a resident of the southern portion, he was improperly represented by the State's two Congressmen, who were under a greater burden than other members of Congress because of their geographically larger constituency (R. 51).[4]

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[3] The "Cargo bill," H.B. No. 20 (R. 11-12), passed the New Mexico House of Representatives on March 8, 1965, by a vote of 42-29. Thereafter, it was recalled from the Senate and on the following day it was killed in the House, 57-18. State legislative proceedings are of course well within the range of judicial notice. *Alaska* v. *American Can Co.*, 358 U.S. 224, 226-227.

[4] The districting proposed in the complaint (¶6, R. 6-7) was identical with that contained in the Runnels bill, one of the two introduced during the pendency of the present action (Pl. Ex. 5, R. 37-38, 87-88). The Cargo bill, *supra* note 3 (Ex. A, R. 11-12), would have placed McKinley and Harding Counties in District 2, thus reducing the population discrepancy between the two districts to 3,397, or only a .0035 deviation from the mean of 475,511; Cargo bill District 1, population 477,210; Cargo bill District 2, population 473,813. Petitioner conceded below (Br. 37) that the proposal in his complaint was merely a suggestion. Obviously the details of division do not become relevant until and unless it is determined that division of the State into districts is required.

The district court denied relief, in part on the ground that "it has no authority to district the State itself" (R. 15), but more specifically on the grounds (R. 26-27) that 2 U.S.C. § 2a (*infra*, pp. A8-A9) "permits and approves of the election of United States Representative at large," that petitioner is not the subject of discrimination since he has the same vote as every other person in the State, and that petitioner had failed to challenge § 3-10-19.1 (quoted *supra*, p. 4), "which provides that United States Representatives be elected at large by position number."

On appeal, the court below held (*infra*, p. A3) that, inasmuch as no injunctive relief was sought against the operation of the statute, no three-judge court was required.[5] It held further (*infra*, p. A4) that, "Since appellant seeks redress for the impairment or debasement of an alleged constitutionally protected voting right, the federal court is vested with jurisdiction to entertain the suit, and appellant undoubtedly has standing to maintain it."[6]

On the merits, the court below affirmed, saying (*infra*, p. 7), "We think the constitutional mandate is satisfied when representatives are chosen by the people of a district of substantially equal population as others or by all of the people of a state," and that "if, as we hold, appellant and those similarly situated are not constitutionally entitled to vote in a district within the state of New Mexico, he cannot complain of the fact that voters in most other states elect their representatives by districts."

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[5] Petitioner's position below (Br. 31-33) was that § 3-10-19.1 was primarily a statute concerning the mechanics of the election process rather than one either directing or authorizing elections at large, and that consequently there was neither any statute to set aside (cf. *Phillips* v. *United States*, 312 U.S. 246), nor was the result of which he complained directly attributable to a statute (*Ex parte Bransford*, 310 U.S. 354, 361).

[6] In view of the foregoing, we feel it unnecessary to argue either jurisdiction or standing in the present petition.

REASONS FOR GRANTING THE WRIT

This case, which presents the concept of constituency as a factor in and a constitutional requirement of Congressional representation, goes to the very heart of the Congressional election process.

First. We have here a variant of what this Court in *Fortson* v. *Dorsey,* 379 U.S. 433, 439, and again in *Burns* v. *Richardson,* 384 U.S. 73, 89, declared would constitute an invidious discrimination, namely, an apportionment which, "although made on a proper population basis, was designed to or would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."

Here the device of a multi-member constituency, namely, the persistent use over nearly 25 years of Congressional elections at large, has operated at least to minimize, and demonstrably to cancel out, the voting strength of the population in the southern half of the State of New Mexico. Here there is discrimination, in our view both invidious and impermissible, against a geographical element: As the table at page 3, *supra,* shows, no Congressman from the southern part of New Mexico has been elected in all that time.[7]

Second. The Congressional authorization for elections at large (2 U.S. C. § 2a(c), *infra,* pp. A8-A9; *Smiley* v. *Holm,* 285 U.S. 355; *Koenig* v. *Flynn,* 285 U.S. 375; *Carroll* v. *Becker,* 285 U.S. 380) deals with a narrow and special situation, one that arises only in the interim period between the assignment of a new quota to a districted State and

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[7] Such expressions as there are in support of partisan gerrymandering as permissible (*Bush* v. *Martin,* 251 F. Supp. 484, 513-515 (S.D. Tex.); *WMCA, Inc.* v. *Lomenzo,* 238 F. Supp. 916, 925-926 (S.D. N.Y.), affirmed, 382 U.S. 4, and see concurring opinion at 5-6), appear to us to give too little weight to *Fortson* v. *Dorsey,* and moreover all such expressions antedate the reiteration of its observations in the later case of *Burns* v. *Richardson.*

the enactment of redistricting legislation to accommodate the increase or decrease as the case may be.

Neither these decisions nor the statute itself, which speaks of "*re*districted" — our italics — deal with the virtually permanent at large situation involved here, where there has been a continuing failure ever to divide New Mexico into districts at any time since 1941, when it first became entitled to more than one Representative in Congress.

There may of course be difficulties in the redistricting process, as indeed there were until the principles of *Wesberry* v. *Sanders,* 376 U.S. 1, could be universally implemented. To take a recent notable example, Alabama lost one Representative in the 1960 census, then elected its quota on an at large basis in 1962 and 1964, and did not redistrict until 1965. See *Moore* v. *Moore,* 246 F. Supp. 578 (S.D. Ala.). Mindful of this Court's admonition (*Virginia* v. *West Virginia,* 222 U.S. 17, 19) that "a State cannot be expected to move with the celerity of a private business man," we would not even intimate that five years after a census, or perhaps even somewhat more, would constitute an unreasonable delay in redistricting.

We do assert, however, that failure to district at all, continuing Congressional representation at large for some 25 years, and that is the basis on which New Mexico has proceeded, is unreasonable, and denies this petitioner his rights under the Constitution. He and those similarly situated should not be required, in Chief Judge Cardozo's phrase, to await "postponement to the Greek Kalends." *Matter of People (Russian Reinsurance Co.),* 255 N.Y. 415, 422, 175 N.E. 114, 116.

Third. The evils of representation at large have been recognized over the years; it is without question the most effective method of denying any voice whatever to minorities who could elect some representatives if the cognizant area were districted, but who lack the numbers effectually to contend against the majority on an at large basis. See *Colegrove* v. *Green,* 328 U.S. 549, 553 (Frank-

furter, Reed, and Burton, JJ.), 565-566 (Rutledge, J.); *Maryland Citizens Comm. &c.* v. *Tawes*, 228 F. Supp. 956, 957 (D. Md.); *Calkins* v. *Hare*, 228 F. Supp. 824, 829 (E.D. Mich.) ("undesirable elections at large"); *Gong* v. *Bryant*, 230 F. Supp. 917, 920 (S.D. Fla.). As all those authorities indicate, the cure of elections at large is worse, or nearly so, than the disease of malapportionment that it was invoked to cure. Cf. Douglas, J., in *Fortson* v. *Dorsey*, 379 U.S. 433, 441-442.

Fourth. Our position is simply this, that permanent Congressional representation at large violates the Constitutional scheme quite as much as do unequal districts, and that just as the failure of Congress after 1929 to reenact the requirement for "districts * * * containing as nearly as practicable an equal number of inhabitants" (Sec. 3 of the Act of Aug. 8, 1911, c. 5, 37 Stat. 13, 14; 2 U.S.C. [1926 ed.] § 3; see *Wood* v. *Broom*, 287 U.S. 1) did not operate to prevent this Court in *Wesberry* v. *Sanders*, 376 U.S. 1, from enforcing that precise concept as a constitutional requirement, so such failure should similarly not defeat the right of an inhabitant of an area within a State that is unrepresented in fact by the operation of a long continued at large scheme from obtaining division of the State into districts.

Moreover, no controlling significance can be attached to the circumstance that bills affirmatively providing that all States must be districted have up to now failed of passage. This Court has frequently indicated the very slight weight that can be given to Congressional silence. *Helvering* v. *Hallock*, 309 U.S. 106, 119, 120; *Girouard* v. *United States*, 328 U.S. 61, 69-70; *Federal Trade Comm.* v. *Dean Foods Co.*, No. 970, last Term, decided June 13, 1966, pp. 10-14 of slip opinion. Accordingly, the failure up to now of H.R.

5505, 89th Congress, to pass both houses,[8] and, we assume for purposes of argument, of similar bills in earlier Congresses, cannot be deemed determinative.

We are of course aware that a number of district court decisions are in accord with the result reached below in holding at large Congressional elections to be proper.[9]

But if, to decide that question (*United States* v. *Classic*, 313 U.S. 299, 317-318), "we turn to the words of the Constitution read in their historical setting as revealing the purpose of its framers, and in search for admissible meanings of its words which, in the circumstances of their application, will effectuate those purposes," then, without question, it can easily be demonstrated that the Founders contemplated that the people should be represented in the House of Representatives by members chosen from districts within each State, while the States as such—i.e., at large—should be represented in the Senate.

It would not be appropriate at this juncture either to marshal, much less to quote extensively from, the materials; we deem it sufficient simply to indicate that a representative group of those who influenced and drew and urged the ratification of the Constitution so expressed themselves. E.g., Montesquieu, *The Spirit of the Laws*, Book XI, chapter 6; *The Federalist*, No. 56 (Madison; see *Wesberry* v. *Sanders*, 376 U.S. at 15); 1 *Elliot's Debates* 360-361

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[8] Passed the House of Representatives on March 16, 1966, 111 Cong. Rec. 5080-5101; see H.R. Rep. No. 140, 89th Cong., 1st sess. As thus passed, this bill, which was designed to provide "Federal Standards for Congressional Redistricting," would have amended 2 U.S.C. § 2a(c), *infra*, pp. A8-A9, to require every State to be districted.

[9] *Calkins* v. *Hare*, 228 F. Supp. 824 (E.D. Mich.); *Moore* v. *Moore*, 229 F. Supp. 435, 439 (S.D. Ala.); *Park* v. *Faubus*, 238 F. Supp. 62, 66 (E.D. Ark.); cf. *Schaefer* v. *Thomson*, 251 F. Supp. 450, 453 (D. Wyo.) (state apportionment); *Yancey* v. *Faubus*, 251 F. Supp. 998, 1001 (E.D. Ark.) (same).

(Luther Martin of Maryland); 2 *id.* 228-230 (J. Smith of N.Y.); 2 *id.* 255 (Hamilton); 3 *id.* 14 (Nicholas of Va.); 3 *id.* 125 (Randolph of Va.); 4 *id.* 71 (Steele of N.C.); 4 *id.* 302-303 (C. C. Pinckney of S.C.). Indeed, Pinckney had made the same point in the Constitutional Convention itself (1 *Records of the Federal Convention* [Farrand ed., 1911] 358, 364, 367), and, more significantly, just before the final vote on the engrossed Constitution, the ratio of representation was unanimously changed from one for every 40,000 inhabitants to one for every 30,000. 2 *Records of the Federal Convention* 643-644; M. Farrand, *The Framing of the Constitution* (New Haven, 1913) 193-194. Even so, there were many expressions of discontent that the smaller number was still too large to be truly representative. 2 *Elliot's Debates* 228-230 (J. Smith of N.Y.); 2 *id.* 545 (Harrisburg, Pa., convention proposal for districts of 20,000); 2 *id.* 442, 530 (Wilson and McKean of Pa. answering objections to the 30,000 figure). And see Jefferson to Monroe, January 12, 1800, complaining of the at large system (9 *The Works of Thomas Jefferson* [P. L. Ford ed., 1905] 90-92).

It is true that at first five States elected by districts, four at large, and Connecticut on a mixed system; Delaware had only one Congressman, and neither Rhode Island nor North Carolina had ratified. L.F. Schmeckebier, *Congressional Apportionment* (Washington, 1941) 131. But by 1842, when Congress passed the first districting Act, 22 out of the 28 States with more than one Representative were districted, and by 1848 every multi-member State elected by districts, except only where there was a temporary failure to district following a reduction in the State's quota. *Id.*, 132, 136.

In short, after 60 years there was compliance with the Founders' intentions as expressed in the Constitution. Surely proper adherence to historical precepts requires the Court to implement their concept of constituency as the

basis of Congressional representation rather than to perpetuate and to legalize on a permanent basis the earlier deviations from the constitutional norm.

Fifth. Simply to show that it has not been overlooked, we note that there can be no doubt at this time of the power of a court of the United States to effectuate Congressional districting within a State whenever such action is constitutionally required. *Alton* v. *Tawes*, 384 U.S. 315, affirming, *per curiam*, 253 F. Supp. 731 (D. Md.).

CONCLUSION

The constitutional issue now presented is, very obviously, both substantial and important. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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JULY 1966.